

COMMUNICATION INNOVATIONS CORPORATION

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Federal Communications Commission  
Office of Secretary



April 9, 1997

William F. Caton, Secretary  
Federal Communications Commission  
Washington, DC 20554

Re: "Opposition to Petition for Partial Reconsideration"  
in WT Docket No. 96-18/PP Docket No. 93-253

Dear Mr. Caton:

Enclosed is an original and ten copies of an "Opposition to Petition for Partial Reconsideration" in WT Docket No. 96-18/PP Docket No. 93-253.

If there are any questions concerning this filing, please contact the undersigned at (703)-243-5995 or (703)-243-5996 [FAX].

Respectfully Submitted,

*Richard O. Pullen*

Richard O. Pullen  
Vice President and General Counsel

ROP/lt

cc: Mr. Vincent H. Petti, Jr., CIC  
Ms. Diane Brown, Skylines Unlimited, Inc.

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Before the  
**FEDERAL COMMUNICATIONS COMMISSION**  
Washington, D.C. 20554

APR 9 1997

Federal Communications Commission  
Office of Secretary

In the Matter of )  
)  
Revision of Part 22 and Part 90 ) WT Docket No. 96-18  
of the Commission's Rules to )  
Facilitate Future Development of )  
Paging Systems )  
)  
Implementation of Section 309(j) ) PP Docket No. 93-253  
of the Communications Act -- )  
Competitive Bidding )

To: The Commission

**OPPOSITION TO PETITION FOR PARTIAL RECONSIDERATION**

Communication Innovations Corporation ("CIC"), by its attorney, respectfully submits this "Opposition" to a "Petition for Partial Reconsideration" ("Petition") filed by PSWF Corporation ("PSWF") on March 26, 1997. PSWF is the corporate successor to American Mobilphone, Inc. ("AMI"), which was an active member of the paging industry in the Southeastern United States until it sold the bulk of its business to Dial Page, Inc. in 1994. (Hereafter, AMI and PSWF shall be referred to collectively as "AMI/PSWF".) AMI/PSWF has petitioned for partial reconsideration of the Commission's decision in its Second Report and Order and Further Notice of Proposed Rulemaking, FCC 97-59 (released on February 24, 1997) ("Second R&O") to award Nationwide Exclusivity to CIC on Private Paging frequency 929.8125 MHz. AMI/PSWF contends that it holds sufficient non-grandfathered (i.e., "Group B") licenses on this frequency to qualify for "regional exclusivity", and that the Commission's recognition of CIC's superior Nationwide status violates AMI/PSWF's legal rights

because the Commission failed to issue an opinion on two petitions for a declaratory ruling. In general, AMI/PSWF requested the Commission to find that CIC was not qualified either to be a Commission licensee, or to have Nationwide Exclusivity. This "Petition" represents the latest round in a three year, on-going dispute between AMI/PSWF, and its contentions are specious.

Nevertheless, there are some things CIC agrees with. First, there is a procedural ambiguity here. The "Second R&O" failed to specify, in the usually boiler-plate "ordering clauses", that the Wireless Telecommunications Bureau was delegated the authority to grant -- in a separate action -- CIC's Nationwide Exclusivity request. This would have been pursuant to the Commission's finding in the "Second R&O" that CIC was fully qualified for such a grant. This omission means that the "Second R&O" was itself the act of licensure (as well as Public Notice of this action), such that any reconsideration must be filed in the context of this on-going rulemaking docket. As AMI/PSWF observes, its protest of CIC's grant is more adjudicative, than legislative in nature. Logically it should not be considered as part of this rulemaking. Nevertheless, CIC (like AMI/PSWF) reserves its rights to comment further on AMI/PSWF's allegations, as well as other matters, within the context of this proceeding.

Secondly, CIC (like AMI/PSWF) wants these allegations to be resolved expeditiously. It should be obvious that CIC's business planning has been seriously disrupted by the

regulatory uncertainty surrounding its qualifications for Nationwide Exclusivity. CIC began filing applications for its Nationwide network in the Summer of 1993. The Commission's Report and Order in PR Docket No. 93-35 ("Exclusivity Decision") [8 FCC Rcd 8318 (1993)] disrupted our filing and truncated our planned network into "Group A" regional system (encompassing most of the Eastern part of the country), and a "Group B" Nationwide system. In 1996, the Commission denied reconsideration [11 FCC Rcd 3091 (1996)] and announced that systems unconstructed by February 8 would not be eligible for Nationwide Exclusivity. The "Second R&O" reversed this decision and granted CIC its long awaited exclusivity. Now comes another round in a three year dispute with AMI/PSWF. Consequently, CIC joins AMI/PSWF in requesting a prompt decision.

In this regard, it should be noted that these allegations are under routine, informal investigation by the Enforcement Division of the Wireless Telecommunications Bureau. CIC has responded by letter this date to the Division's inquiries and we believe that they should be able to resolve AMI/PSWF's allegations in relatively short order. Included with this letter, as background, is bound copy of the pleadings which AMI/PSWF and CIC have exchanged over the last three years. Because of its length (over 100 pages), we are not now filing a copy in this proceeding. However, copies of all of CIC's pleadings were served, at the time, upon the parties which participated in the reconsideration of the "Exclusivity Decision". We believe that a review of this file

will show that AMI/PSWF allegations concerning CIC's licensing history have been raised in many forms, answered by CIC, and considered by the Commission, numerous times in the past, and prior to CIC being granted Nationwide Exclusivity. Thus, we do not think it necessary to address here all of the express and implicit allegations AMI/PSWF has made.

But some general observations appear appropriate. First, AMI/PSWF's "Petitions" have been styled as requests for a declaratory ruling under Section 1.2 [47 C.F.R. § 1.2] of the Commission's Rules. CIC understands that there is no "private right" to require consideration of such a request; that such requests are seldom granted; and that there are no formal pleadings, or pleading schedules, associated with such requests unless the Commission issues a Public Notice inviting general comment. Instead, such requests typically result in an informal investigation in order to determine what, if any, agency response is required.

This is in contrast to "Petitions to Deny" applications for radio licenses which are authorized by Section 309 (d) of the Communications Act [47 U.S.C. § 309(d)]. Under the law, any party in interest may file a "Petition to Deny" during a thirty day period following issuance of a Public Notice that the application has been accepted for filing. The Commission is then required to consider the issues raised, and dispose of them, either by issuing a concise opinion, or by designating the matter for hearing, if a substantial and material question of fact is found.

We mention this obvious distinction because AMI/PSWF appears to consider its "Petitions" to be some form of post-licensing "Petition to Deny", rather than a request for an informal investigation, which may or may not result in Commission action. In this regard, we are not aware of any authority which provides for such a pleading. The Commission should also remember that the Rules applicable to CIC's licensing history are those of Part 90, and not those of Part 22.

We now turn to some of more salient allegations made in AMI/PSWF's March 11, 1997 "Petition for Declaratory Ruling". First, CIC wishes to confirm that our Nationwide Paging network was constructed, as we stated in our July 30, 1996 letter. There is nothing implausible about our construction schedule -- our July 30 letter was meant to be a summarization of the construction information which we had received. It was not intended to be some form of timely, progress report. Nor were we prevented from modifying our proposed, original sites. [See, Letter from Terry L. Fishel (FCC) to Vincent H. Petti (CIC) of July 12, 1996]

Secondly, "co-channeling" does constitute construction under the Part 90 rules. Although the Commission prohibited the use of multi-frequency transmitters by two different licensees in its Report and Order on the Revision of Part 22 of the Commission's Rules Governing the Public Mobile Services, 9 FCC Rcd 6513, 6528 (1994), Part 90 has never prohibited such operations. The two letters cited by PSWF/AMI concern common carrier mobile licensees. Indeed, section

90.185 [47 CFR § 90.185] allows multiple licensing by different licensees for the same transmitter site. Also, section 90.179 [90 CFR § 90.179] permits shared use of a radio station. And, the Commission clearly accepted the use of multi-frequency transmitters to determine exclusivity when it stated:

In the PCP Exclusivity Order, we considered the issue of whether licensees should be allowed to count multi-frequency transmitters for exclusivity purposes on more than one channel. We concluded that licensees should not be barred from using multifrequency transmitters, but that each such transmitter would be counted only once for exclusivity purposes. The purpose of this requirement was to ensure that licensees would not claim exclusivity on multiple channels by repeatedly counting the same transmitter. We noted, however, that a licensee using multi-frequency transmitters could qualify for exclusivity on two frequencies by constructing twice the number of transmitters required to obtain one channel. Memorandum Opinion and Order in PR Docket No. 93-35 at ¶ 26 (released February 13, 1996)

In this regard, CIC has met this requirement.

Turning to the April 26, 1996 "Petition for a Declaratory Ruling", CIC did not respond to its filing because at the time no response was thought necessary, legally required, or requested by a Commission staff familiar with AMI/PSWF -- CIC pleading history. We did not implicitly concede the truth of anything.

Indeed, one reason for no response was that AMI/PSWF was simply wrong about its interpretation of CIC's filing history. In its 1994 "Reply Comments" to the reconsideration of the "Exclusivity Decision" in PR Docket No. 93-35, CIC described in tedious detail its corporate history, business

intentions, and filing history -- all for the purpose of showing that the Commission's selection of an arbitrary date to determine "grandfathered" frequency exclusivity had disrupted the systematic preparation and filing of applications for a nationwide paging system. (A copy of these "Reply Comments" was served on all participants to the reconsideration proceeding.) We also explicitly stated that our decision to request "grandfathered", "Group A" regional exclusivity and "non-fathered", "Group B" nationwide exclusivity was not based upon a desire to become a regional paging service. Rather, we filed for regional exclusivity to protect our frequency rights on the East Coast from being preempted by other "Group A" regional carriers, such as AMI/PSWF. AMI/PSWF presumably knew this filing history, because they filed a "Motion to Strike" the pleading in order to prevent its consideration.

CIC was able to do this, because under section 90.495 (a) [47 C.F.R. § 90.495 (a)], frequency exclusivity is based upon a cumulative number of transmitters, and not based upon mutually exclusive categories. In other words, CIC was not precluded from having transmitters which were part of a "Group A" regional system, which then could develop as part of the basis for a "Group B" nationwide system.

At no time did CIC violate section 90.495 (c) [47 C.F.R. § 90.495 (c)] by refiling for a regional system. All CIC's refiling was intended to keep current its eligibility for "Group B" Nationwide Exclusivity for the time when the Commission finally got around to processing "Group B"



exclusivity requests. This was well known to the Commission's staff at the time and can be confirmed by the coordination requests which the Personal Communications Industry Association ("PCIA") submitted to the FCC in Gettysburg. Also, it should be remembered that Part 90 does not contain a rule similar to section 22.121 [47 C.F.R. § 22.121], which prevents the filing of repetitious, inconsistent, or conflicting applications.

Finally there is the question of AMI/PSWF's licensing status: CIC is simply mistified how AMI/PSWF obtained a recent grant of new licensees, so as to now claim to have "Group B" regional exclusivity.

#### Conclusion

The Commission should reaffirm its finding in the "Second R&O" that CIC had qualified for a grant of Nationwide Exclusivity on Private Paging frequency 929.8125 MHz. Although AMI/PSWF has repeatedly attacked the validity of our licenses and the manner in which they were obtained, it has made no allegations which can not be explained by the Part 90 rules or the application processes which the Commission applied to Nationwide Paging applications. CIC has constructed its system in compliance with the Rules and wishes an expeditiously resolution of AMI/PSWF's allegations so that we can continue the commercial development of our paging business.

Respectfully submitted,

COMMUNICATION INNOVATIONS CORPORATION

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April 9, 1997

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### CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing has been served upon all parties listed above by U.S.P.O. First Class Mail (postage prepaid), or by Hand Delivery, this 9th day of April 1997

  
Richard O. Pullen

\*Served by Hand Delivery.